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April 30, 2015
Court of Appeals
Division I
State of Washington

NO. 72018-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JASON BYRON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George Appel, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Defense counsel was ineffective and denied appellant a fair trial when she placed the issue of appellant's community custody status before the jury.

Issue Pertaining to Assignment of Error

Whether a defendant was on community custody at the time of his current offenses is a sentencing matter to be determined by the sentencing judge. Unfortunately, defense counsel was inexperienced and made appellant's community custody status an issue for jurors to consider. Where this evidence was irrelevant and incredibly prejudicial, was appellant denied his Sixth Amendment right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor's Office charged Jason Byron with (count 1) Attempting to Elude a Pursuing Police Vehicle and (count 2) Possession of a Stolen Vehicle. CP 61-62. The State also alleged that Byron was on community custody when he committed these crimes, which would increase his offender score by one point on each conviction. CP 61-62; RCW 9.94A.525(19) ("If the present conviction is for an offense committed while the offender was under community custody, add one point.").

Initially, Byron was represented by the Snohomish County Public Defender's Office. The day before trial was to begin, however, appointed counsel informed the court that Byron was seeking to hire private counsel and had been in touch with attorney Marilyn Gunther. 1RP¹ 2. Since Gunther was not present, the matter was continued a week. 1RP 5.

Gunther appeared at the next hearing and confirmed her desire to represent Byron. 2RP 2-3. The Honorable Joseph Wilson questioned Gunther's qualifications to handle the matter. Judge Wilson was familiar with Gunther solely from family law cases and asked if she had previously handled felony criminal matters. 2RP 4. Gunther responded that she handled two felonies in her career, the most recent more than a decade ago, and the last criminal representation she could recall was a misdemeanor matter in 2004. 2RP 4-6. Gunther nonetheless assured Judge Wilson she was ready to handle Byron's case and was permitted to take over his representation. 2RP 6.

Judge Wilson's concern was warranted. At Gunther's next appearance – a CrR 3.5 hearing to determine the admissibility of

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 1/30/14; 2RP – 2/6/14; 3RP – 3/20/14; 4RP – 4/18/14; 5RP – 4/21/14; 6RP – 4/22/14; 7RP – 4/23/14; 8RP – 5/7/14.

Byron's post-arrest statements to police – Gunther seemed confused, expressing surprise there was a hearing (even though she had previously been informed) and indicating she had not received any paperwork on the matter (even though she had been provided a copy of the State's motion to admit Byron's statements). 3RP 3-4; Supp. CP ____ (sub no. 33, State's Motion to Admit the Defendant's Statements).

Gunther's confusion persisted. Consistent with the issue at hand, a trooper with the Washington State Patrol testified that Byron's statements made in the trooper's car and at the jail were obtained following proper advisement under Miranda.² 3RP 4-10. Gunther, however, focused on the circumstances of the attempted traffic stop ultimately leading to Byron's arrest and intended to argue the stop may have been a pretext until the court explained the legality of the stop was not at issue in the absence of a defense motion directed to that topic. 3RP 11-12. Gunther then argued that Byron's statements were irrelevant, requiring another lesson from the court as to what was and what was not at issue for purposes of CrR 3.5. 3RP 13.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At her next appearance a month later, Gunther asked for a one to two-week continuance because she was not prepared for trial. She indicated she had not yet received all discovery from prior counsel. 4RP 3. That request was denied. 4RP 4.

Trial began three days later with Gunther informing the court she still was not ready for various reasons, including what she perceived to be missing or late discovery, the need to possibly view an item of evidence collected by police, new information concerning a police canine involved in the case that made Gunther want to explore the dog's training, and the need to interview Byron's community custody officer. 5RP 4-12, 16-20. Concerning the canine, Gunther also complained that the State had not listed the dog on its witness list, and she believed the dog should be physically present in court because "the dog's testimony is testimonial." 5RP 7-8.

After the prosecutor explained the history of the case and addressed Gunther's complaints, the court denied the defense motion to continue. 5RP 12-16, 25. The court found that the State had complied with its discovery obligations and Gunther would have an opportunity to interview the CCO and the canine handler before the State called each witness. 5RP 20-25.

During the discussion of these issues, the prosecutor noted that the defense was not stipulating to Byron's community custody status, which deviated from the usual practice of keeping the issue from the jury and simply allowing the court to consider the stipulation if the defendant is ultimately convicted. 5RP 14. Gunther explained that she had encouraged Byron to stipulate, but Byron said "no . . . that's testimony, let them prove it." 5RP 18.

Gunther was provided an opportunity to interview the CCO. 5RP 51-53. Gunther then moved to exclude the CCO's testimony, arguing the CCO was not able to provide a clear chronology of Byron's supervision history, which Gunther argued would leave jurors confused. 5RP 54. The motion was denied. 5RP 54-55.

Trial testimony revealed the following. On June 17, 2013, someone stole Andrew Nelson's 2003 Yamaha R1 motorcycle from a Seattle parking lot. 5RP 81-83. Nelson would not see his motorcycle again until September 7, 2013. 5RP 84.

At about 1:00 a.m. on the morning of September 7, 2013, Washington State Patrol Trooper Anson Statema spotted an individual riding Nelson's motorcycle on I-5 in Snohomish County. 5RP 104-106. The rider was speeding and accelerated further when Trooper Statema pulled his marked car alongside. 5RP 106-

109. Statema activated his lights and siren, but the rider would not stop. 5RP 109-110. Statema estimated the motorcycle reached 130 miles per hour. 5RP 110. Eventually, the rider crashed in a grassy area near an off ramp before running away. 5RP 110-111.

Statema could see that the rider was wearing a black helmet, jacket, dark jeans, and black and white shoes. 5RP 113. He did not, however, see the rider's face. 5RP 111. He watched as the rider discarded his helmet on an embankment along the ramp and continued to flee. 5RP 114-115. But the rider was about 100 yards away by that point, and Statema could only see a "whitish" face. 5RP 118-119. Statema drove to another location, where he once again spotted the rider, who had now also discarded his jacket, revealing a dark T-shirt. 5RP 121. The rider eventually ran across a street and between two apartment buildings. 5RP 124-125.

A K-9 unit arrived and the dog tracked from an area near the discarded helmet and headed approximately one and half blocks to an apartment building, where it located Byron lying down on a second floor landing. 5RP 127-129; 6RP 10-15, 32-43. He was sweaty, had leaves and grass on his shirt and face, and he had dirt stains on his knees. 5RP 130; 6RP 15. The rider's jacket was

never located. 5RP 139. Statema testified that – other than the helmet and jacket – Byron was wearing the same clothes as the motorcycle rider and had the same general physical build. 6RP 4-5.

Because Byron's community custody status was litigated during trial, jurors heard substantial evidence on the subject. On direct examination, CCO Sean Thompson testified that he supervises people after they have been convicted of a crime; Byron was on community custody on September 7, 2013; and Byron's community custody originally was supervised in Spokane, but it was transferred to Seattle and Thompson's caseload after October 30, 2013, when Byron moved to the area. 5RP 62-65.

On cross-examination, and in response to Gunther's questions, Thompson further revealed that (1) Byron had an outstanding warrant for his arrest for failing to report to his CCO when arrested September 7, 2013 on the current charges (5RP 65, 71-72); (2) Byron was on community custody from a 2008 conviction and sentence (5RP 67, 73); (3) Byron rarely reported while in Spokane (5RP 71-72); (4) Byron has had "seven violation processes," mostly because of failure to report to his CCO, resulting in seven arrest warrants, which had been cleared each

time with a new arrest (5RP 69, 74); and (5) Thompson may have met Byron many years earlier during his supervision "for a previous case." 5RP 74-75.

Jurors convicted Byron as charged and entered an express finding that he was on community custody at the time of his offenses. CP 40-42. With the additional point added for Byron's community custody status, the court concluded his offender score was 7 and imposed a total sentence of 29 months. CP 20-21. Byron timely filed his Notice of Appeal. CP 1-17.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE AND DENIED APPELLANT A FAIR TRIAL WHEN SHE PLACED THE ISSUE OF APPELLANT'S COMMUNITY CUSTODY STATUS BEFORE THE JURY

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845

P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

Competent counsel conducts research on the law applicable to the case at hand. Bush v. O Connor, 58 Wn. App. 138, 148, 791 P.2d 915 (an attorney unquestionably has a duty to investigate the applicable law), review denied, 115 Wn.2d 1020, 802 P.2d 125 (1990); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (reasonable attorney conduct includes a duty to investigate the facts and law), review denied, 90 Wn.2d 1006 (1978); see also Strickland, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations").

Defense counsel was ineffective at Byron's trial when she placed the issue of Byron's community custody status before jurors. The prosecution was willing to follow common practice and remove the issue from jurors' consideration. 5RP 14. Gunther explained that, although she encouraged Byron to stipulate to his status, Byron had responded, "let them prove it." 5RP 18. The defect here is not Gunther's decision to follow her client's desire to have the State prove the matter rather than stipulate. The defect is

Gunther's failure to recognize that community custody status is to be proved to the court and not a jury.

Almost a decade ago, the Supreme Court of Washington held that the issue of community custody status under RCW 9.94A.525 is not part of the determination of guilt on the current offense to be proved to a jury beyond a reasonable doubt. Instead, it is a sentencing issue for the court to resolve by a preponderance of the evidence. See State v. Jones, 159 Wn.2d 231, 234-248, 149 P.3d 636 (2006), cert. denied, 549 U.S. 1354, 127 S. Ct. 2066, 167 L. Ed. 2d 790 (2007); State v. Wheeler, 145 Wn.2d 116, 121, 34 P.2d 799 (2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1559, 152 L. Ed. 2d 482 (2002); see also RCW 9.94A.500(1) (requiring proof of criminal history by a preponderance of the evidence).

A legitimate tactic cannot serve as the basis for a claim of deficient representation. State v. Kylo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). But this was not a legitimate tactic. Gunther's overall representation showed she was "rusty" on criminal matters. And competent counsel would have understood that there was no advantage to trying community custody to the jury. Byron quite clearly was on community custody on September 17, 2013. Gunther did not even argue otherwise during closing. See 6RP

103-112. Jurors were asked if the State had proved community custody beyond a reasonable doubt. CP 42, 51. But even if they failed to find this level of proof satisfied, the sentencing court would not have been precluded from entering a contrary finding based on proof by a preponderance of the evidence. See City of Aberdeen v. Regan, 170 Wn.2d 103, 105-113, 239 P.3d 1102 (2010) (finding based on insufficient proof beyond a reasonable doubt does not preclude subsequent judicial finding of sufficient proof based on lesser standard); Standlee v. Smith, 83 Wn.2d 405, 407-409, 518 P.2d 721 (1974) (same).

Moreover, the downside to placing this issue before jurors was significant. Jurors learned unnecessarily that Byron had an outstanding warrant for his arrest for failing to report to his CCO when arrested September 7, 2013, Byron had previously been convicted and sentenced in 2008, Byron rarely reported as required, Byron had been arrested seven times for noncompliance, and Thompson may have met Byron many years earlier during his supervision “for a previous case,” which raised the possibility of a third criminal case in addition to the current case and the case in 2008. See 5RP 65, 67, 69, 71-75. None of this was necessary,

relevant, or even admissible under ER 401, 402, 403, or ER 404(b).³ And all of it painted Byron in an extremely poor light.

Byron suffered prejudice because there is a reasonable probability that but for counsel's error, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94). Neither Trooper Statema nor anyone else was able to see the face of the individual operating Nelson's motorcycle. This left room for reasonable doubt about whether Byron was the motorcycle rider. But once jurors learned about Byron's criminal history, which went back many years, and his repeated failure to abide by community custody conditions, they were more likely to conclude he committed the charged crimes because he was precisely the sort of individual who would engage in such conduct.

³ Evidence must be relevant to be admissible. ER 402. It must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if relevant, however, evidence must be excluded where any relevance is substantially outweighed by the danger of unfair prejudice. ER 403. Moreover, the rules prohibit evidence of prior crimes or wrongs "to prove the character of a person in order to show action in conformity therewith." ER 404(b).

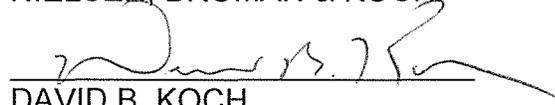
D. CONCLUSION

Byron was denied his Sixth Amendment right to competent representation. His convictions should be reversed and he should receive a new trial with new counsel.

DATED this 30th day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
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v.)	COA NO. 72018-0-I
)	
JASON BYRON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON BYRON
DOC NO. 865124
COYTOE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL 2015.

X *Patrick Mayovsky*